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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SECRETARY
RECORDING & SERVICE
BRANCH

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
)	
TEXAS UTILITIES GENERATING)	Docket Nos. 50-445 and
COMPANY, <u>et al.</u>)	50-446
)	
(Comanche Peak Steam Electric)	(Application for
Station, Units 1 and 2))	Operating Licenses)

APPLICANTS' BRIEF IN RESPONSE
TO NRC STAFF EXCEPTIONS TO
ATOMIC SAFETY AND LICENSING
BOARD'S ORDER DENYING RECONSIDERATION
OF SEPTEMBER 30, 1982

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December 22, 1982

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I. SUMMARY

Applicants do not address in this brief the specific legal and policy questions raised by the NRC Staff on appeal involving the Staff's refusal to disclose the identities of individuals identified by letter designation in an Inspection Report. Rather, Applicants address only the related question of whether any party to this proceeding has been prejudiced by the NRC Staff's decision not to disclose. As demonstrated below, the intervenor was or should have been aware of the identities of these individuals, and was afforded a full opportunity to depose, present testimony, and/or conduct cross-examination of any of the individuals identified in that Report despite the Staff's decision not to disclose. Accordingly, Applicants urge the Appeal Board to so find in its disposition of the instant appeal.

II. STATEMENT OF THE CASE

On October 8, 1982, the Nuclear Regulatory Commission ("NRC" or "Commission") Staff ("Staff") submitted its Exceptions¹ to the Order² of the Atomic Safety and Licensing Board ("Board") in the captioned proceeding denying the Staff's Motion for Reconsideration³ of the Board's August 4, 1982, "Order to Show Cause." In its Order, the Board ruled that the Staff had failed to show good cause why sanctions should not be imposed for its refusal to disclose the identities of eight of the ten individuals⁴ identified only by letter designation in NRC Investigation Report 82-10/82-05 (Staff Exhibit 199) and to produce unexpurgated copies of witness statements signed by those individuals during the Staff's investigation. Order at 1-2. The Board indicated that absent compliance with the Order, or timely appellate review, the Board would impose sanctions upon Staff counsel. Order at 14.

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- 1 "NRC Staff's Exceptions to the Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982," October 8, 1982 ("Exceptions").
 - 2 "Order Denying Reconsideration," September 30, 1982 ("Order").
 - 3 "NRC Staff's Response to Order to Show Cause and Motion for Reconsideration," August 24, 1982.
 - 4 Two individuals had been shown by the Staff in its Response to the Order to Show Cause to have expressly requested confidentiality and were, therefore, excluded by the Board from the scope of its Order. Order at 14.

In its Exceptions, the Staff argues that the Order (a) rests upon an improper interpretation of pertinent precedent governing the disclosure of confidential information, (b) is unsupported by a proper determination that the ordered disclosure is necessary to a decision in this proceeding or by a proper balancing of the benefit of disclosure against the harm which might result therefrom, and (c) ignores pertinent facts and applicable case law in threatening to impose sanctions against the Staff and/or Staff counsel. For these reasons, the Staff has appealed the Board's Order and urges reversal. In the alternative, should the Atomic Safety and Licensing Appeal Board ("Appeal Board") determine that an appeal as of right is premature at this time, the Staff seeks consideration of these issues pursuant to directed certification.⁵

The Staff has set forth an accurate statement of pertinent background information in its Brief in Support of Exceptions⁶ which Applicants adopt and do not repeat here. However, Applicants provide below certain additional facts bearing on matters we believe warrant Appeal Board consideration.

Prior to the June hearings, Mr. Charles A. Atchison contacted the Intervenor in this proceeding, Citizens Association for Sound Energy ("CASE"), to discuss his allegations to the NRC

⁵ "NRC Staff Motion for Directed Certification," November 17, 1982.

⁶ "NRC Staff's Brief in Support of Its Exceptions to Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982," November 17, 1982, at 3-10 ("Brief").

which were addressed in I&E Report 82-10/82-05. Tr. 710, 727. At those hearings, CASE indicated it intended to call Mr. Atchison as a witness. Tr. 727-28. However, when it became apparent that all scheduled testimony could not be completed, the Board scheduled an additional hearing session for July, directed each of the parties to submit a proposed witness list and indicated it would afford an opportunity for depositions to be taken of potential witnesses. Tr. 1541. In its witness list, CASE confirmed it would call Mr. Atchison as a witness at the July hearing session.⁷ CASE subsequently deposed several individuals named on its witness list in accordance with the Board's directive.⁸ Prior to the July hearings, CASE submitted pre-filed direct testimony of Mr. Atchison. CASE Exhibit 650.⁹

During the July hearing session, after the Staff declined to provide the identities of the letter-designated individuals in I&E Report 82-10/82-05, Applicants presented Mr. Ronald G. Tolson, the Site QA Supervisor for Comanche Peak, who identified each of the designated individuals. Tr. 2506, 2508-13. Mr. Atchison himself substantially confirmed Mr. Tolson's identifications. Tr. 3442-53. In addition, an unexpurgated copy of Mr. Atchison's signed witness statement, which identifies by

⁷ "CASE Proposed Witness List," June 23, 1982.

⁸ Two of the individuals deposed by CASE were in the I&E Report.

⁹ The Board also permitted Mr. Atchison twice to submit written supplements to his testimony during the July and September hearing sessions. CASE Exhibits 656 and 684.

name many of the individuals designated only by letter in I&E Report 82-10/82-05, was admitted into evidence. Tr. 3466-68; CASE Exhibit 663. Further, inadvertent disclosure of the identities of three informants was made by Staff witnesses during cross-examination and Board questioning. Tr. 2573, 2593, 2698.

After scheduling further hearings for September, the Board directed Applicants to identify rebuttal witnesses, including witnesses in rebuttal to Mr. Atchison's allegations, and afforded CASE an opportunity until August 23, 1982 to depose those individuals. Tr. 3550, 3552, 3556. CASE deposed four of Applicants' five rebuttal witnesses on the allegations of Mr. Atchison on August 23-24, 1982. Tr. 4435, 4439.¹⁰ All four of those individuals had been identified by letter designation in I&E Report 82-10/82-05. See Applicants' Exhibit 141 at 18-19.

Prior to the September hearings, CASE submitted an "answer" to the Staff's response to the Order To Show Cause and a motion for reconsideration,¹¹ in which it moved, inter alia, that the Board order an independent investigation into the matter of the identities of the letter-designated individuals to determine whether their testimony was necessary to complete the record in

¹⁰ In a telephone conference on August 20, 1982, the Board extended the deadline for taking depositions to afford CASE a further opportunity to complete depositions of Applicants' witnesses.

¹¹ "CASE's Answer to NRC Staff's Response to Order to Show Cause and Motion for Reconsideration," September 3, 1982.

this proceeding. CASE Answer at 11-12. CASE further moved that the Board call "all" individuals designated by letter in the I&E Report who had not requested confidentiality. Id.

At the September hearings, CASE had full opportunity to and did conduct cross-examination of Applicants' rebuttal panel on Mr. Atchison's allegations. Tr. 4416-43, 4492-4628, 4630. CASE utilized the depositions of several of those witnesses during cross-examination. Tr. 4435. In fact, in declining to rule on CASE's "answer" to the Staff's response to the Order to Show Cause, the Board noted that all parties had been afforded their full rights during the hearings and that the Staff's refusal was one for Appeal Board consideration. Tr. 5762-83.

Finally, at the close of the September hearings, the Board directed that all parties submit briefs regarding the status of the record and to identify areas where the parties believed additional information was required to close the record. Tr. 5766.¹² In its brief, CASE did not seek further development of the record with identification or testimony of the letter-designated individuals in I&E Report 82-10/82-05.¹³

12 See Memorandum and Order, September 22, 1982.

13 "CASE's Response to Board's 9/22/82 Memorandum and Order For Briefs Re: Necessary Documents and Information," October 9, 1982.

III. REFERENCE TO RULINGS AND
STATEMENT OF ISSUES

The NRC Staff accurately has referenced the Board's rulings which are at issue and the questions those rulings present for review. Accordingly, Applicants hereby adopt those portions of the Staff's brief. Brief at 10-11.

Applicants here neither address directly the legal and policy issues raised by the NRC Staff nor express an opinion as to the appropriate resolution of those issues. Applicants do address another matter closely related to the Board's rulings and the issues presented for review which we believe is appropriate for Appeal Board consideration at this time. Specifically, Applicants submit that the Appeal Board should find, regardless of the disposition of the questions presented for review by the Staff, that no prejudice has resulted to the parties by virtue of the Staff's refusal to disclose the identities of individuals with letter designations in I&E Report 82-10/82-05.

IV. SUMMARY OF ARGUMENT

A. Review of The Question of Prejudice

The Appeal Board may review any matter on interlocutory review which it finds is appropriate for disposition at that time. Applicants believe the question of whether any party was prejudiced by the Staff's refusal not to disclose the identities of the individuals with letter designations in I&E Report 82-10/82-05 is appropriate for review at this time.

First, Applicants submit that the question of prejudice is ripe for review. Applicants have presented testimony of the principal individuals identified in I&E Report 82-10/82-05 and those witnesses have been subject to cross-examination and Board questioning. The Board itself has indicated that further examination of issues concerning the identification of the letter-designated individuals should occur before the Appeal Board. Also, in briefs on the status of the record, no party stated that additional testimony is necessary for a complete record on these issues. Thus, further developments in the proceeding materially affecting the possibility of prejudice on this issue are unlikely to occur.

Further, the question of prejudice is intertwined with issues concerning the need for disclosure, which are addressed by the Staff in its Brief. Staff Brief at 23. Thus, consideration of the prejudice question in conjunction with those issues is appropriate. In addition, CASE has already raised this question by suggesting it would be prejudiced by the Staff's decision not to disclose the identities of the individuals interviewed in I&E Report 82-10/82-05. Thus, the question of prejudice is likely to be raised on appeal and its disposition by the Appeal Board at this time could eliminate the possibility of remand on these grounds. Judicial efficiency thus suggests that the Appeal Board address the issue of prejudice now.

B. No Prejudice Resulted From Staff Refusal

The facts surrounding the Staff's refusal to disclose the identities of individuals referenced in the I&E Report demonstrate that no prejudice has been caused to any party. CASE had ample opportunity through Mr. Atchison to identify these individuals prior to and during the hearings, and to depose and even call them as witnesses (friendly or hostile). Further, Applicants identified all the individuals and produced the principal individuals as witnesses after the Staff's decision not to disclose their identities. Thus, while the Staff's refusal to disclose may or may not have been proper, no adverse consequences resulted from that decision.

V. ARGUMENT

A. Review of Prejudice Question Is Appropriate

Whether the Appeal Board determines that the appeal of the Board's Order as of right is appropriate at this time, or whether it finds that an appeal as of right is premature and review must be taken by directed certification pursuant to 10 C.F.R. § 2.718(i), the scope of review is a matter within the discretion of the Appeal Board. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892, 1022-23 (1977) (broad authority to review initial decisions); see also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975) (10 C.F.R. § 2.718(i) places no limitations on questions which may be addressed on directed

certification). In addition, matters not independently appealable may be reviewed when inextricably intertwined with prior orders already held appealable. See Long v. Bureau of Economic Analysis, 646 F.2d 1310, 1317 (9th Cir. 1981). Review of interlocutory orders may embrace "such questions as are basic to and underlie the order" under review. See generally, 9 Moore's Federal Practice ¶ 110.25[1].¹⁴

Applicants submit that the Appeal Board, in the exercise of its broad authority to review Licensing Board decisions, should consider the issue of whether any prejudice has arisen by virtue of the Staff's refusal to disclose the identities of individuals interviewed in the Staff investigation. This issue is ripe for review at this time because it is inextricably intertwined with issues concerning the necessity for formal identification by the Staff, as opposed to identification by other means (such as by the Applicants), of those individuals. Further, the question is

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Consideration of practice in the federal courts is appropriate where, as here, similar circumstances arise and the policies underlying the federal practice are similarly applicable to Commission practice. See San Onofre, ALAB-673, infra at 697, n.14; see also, Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568 (1977). Applicants submit that the same considerations of judicial economy and finality of decisions which underly the federal practice in this regard are equally applicable to Commission practice. Indeed, in view of the Appeal Board's broader appellate authority than that of Federal Courts of Appeal, it seems such practice would be even more appropriate before the Appeal Board. See Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 402-05 (1976).

likely to arise on appeal and disposition at this time could eliminate the possibility of remand on this question.

1. Ripeness.

Regardless of the disposition of the legal issues concerning the informer's privilege, the question of whether any prejudice resulted from the Staff's decision not to disclose the identities of individuals in I&E Report 82-10/82-05 is ripe for disposition at this time. The intervenor was or should have been aware of the identities of each individual, for the intervenor's major witness (Mr. Atchison) was intimately familiar with the subject matter in I&E Report 82-10/82-05 (Staff Exhibit 197 at 3; Tr. 3442-53). Applicants made available for deposition and as witnesses, subsequent to the Board's Order to Show Cause, the principal individuals identified by the Staff in the I&E Report. These witnesses were subject to cross-examination by the intervenor and to Board questioning. In addition, the Board has already stated that further consideration of issues concerning the Staff's decision not to disclose should be addressed before the Appeal Board. Tr. 5782-83. Subsequently, in briefs submitted on the status of the record, no party maintained that additional testimony on I&E Report 82-10/82-05 is necessary to complete the record.¹⁵ Thus, it appears there is little likelihood that circumstances will change regarding the question

¹⁵ The failure of the intervenor to argue a need for further testimony on the I&E Report in their brief on the status of the record may preclude the intervenor from later raising the point on appeal. Applicants would not object if the Appeal Board resolved the prejudice issue on that basis.

of possible prejudice from the Staff's refusal to disclose those identities.

2. Similarity of Issues.

Further, both the issues of prejudice and necessity involve consideration of whether Staff disclosure of the letter-designated individuals (as opposed to identification on the record by other means) is needed to assure an adequate record. The question of necessity focuses primarily on whether the Board was able to fulfill its responsibility to assure the record is adequate for it to reach a decision. The question of prejudice involves whether parties have had an adequate opportunity to develop a record in support of their positions. These questions clearly are unextricably intertwined.

3. Judicial Economy.

Finally, disposition of this question at this time would eliminate the need to dispose of an issue which may arise later on appeal and the resultant possibility of a remand to correct any prejudice which might be found to have resulted from this matter. Intervenor CASE, even after having deposed Applicants' witnesses on the Atchison allegations, and knowing the intended scope of their testimony, filed on September 3, 1982, an "Answer" to the Staff's response to the Order to Show Cause. Therein, CASE moved the Board to call as witnesses all individuals identified by letter designation in the I&E Reports. CASE Answer at 8-9. (Curiously, CASE did not simply call the individuals itself.) In addition, CASE suggested that failure to compel the

attendance of all individuals as witnesses was prejudicial to its interests. CASE Answer at 10. The possibility that this question will arise on appeal is real, therefore, with the attendant risk of a remand. Consideration of the matter at this time should eliminate this risk.

B. No Prejudice Has Resulted
From Staff Refusal to Disclose

Prejudice to a party from the exclusion of evidence will not be found unless a substantial right is affected and the substance of the excluded evidence is made known, or is apparent. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 697 n.14 (1982).¹⁶ Where an adequate opportunity to pursue the matter is nonetheless afforded, the exclusion of evidence is not prejudicial. *Id.* at 697.

In Commission practice, every party has the right to present such oral or documentary evidence and rebuttal evidence and conduct such cross-examination as required for a full and true disclosure of the facts. 10 CFR § 2.743(a). The Staff's decision not to disclose the names of individuals identified by letter designation in I&E Report 82-20/82-05 has not prejudiced

¹⁶ While this case does not involve the "exclusion" of evidence by a ruling of the Board as was involved in San Onofre, the Staff's refusal to disclose the identities of potential witnesses produces a similar concern for a party's right to present relevant and material evidence for the record. Accordingly, the standard governing the determination of prejudicial error expressed in San Onofre would be equally applicable here.

the rights of any party to explore the issues raised in that Report.

CASE first became aware of the allegations of Mr. Atchison that gave rise to the I&E Report (and was in contact with Mr. Atchison) prior to the June hearings. Tr. 710, 727. From that time forward, CASE had the opportunity to determine through Mr. Atchison the identity of individuals with information bearing on his allegations. In fact, CASE indicated at the June hearings that it intended to call Mr. Atchison as a witness. Tr. 727-28.

CASE also was given the opportunity to depose individuals with information regarding, inter alia, Mr. Atchison's allegations. Tr. 1541. Thus, CASE had the opportunity to pursue all of Mr. Atchison's allegations through deposition prior to the July hearings.

At the July hearings, when the question arose regarding the identities of Applicants' personnel designated by letter in I&E Report 82-10/82-05, Applicants identified each individual for the record. Tr. 2506, 2508-13. Also, the Staff inadvertently confirmed Applicants' identification of three named individuals. Tr. 2573, 2593, 2698. That CASE had access to that information through Mr. Atchison was confirmed when Mr. Atchison later demonstrated his knowledge of the identities of these individuals in substantially affirming the information provided by Applicants. Tr. 3442-56. Thus, the Staff's decision not to disclose the identities of those individuals did not deprive any party of that information.

Subsequently, CASE was given an additional opportunity to depose persons identified as being included in the I&E Report in deposing Applicants' rebuttal witnesses regarding Mr. Atchison's allegations. Tr. 3550-56. CASE deposed several of those individuals named in the I&E Report on August 23-24, 1982.¹⁷ At the September hearing session, CASE was given full opportunity to conduct cross-examination of Applicants' rebuttal witnesses. Tr. 4416-45, 4492-4628, 4630.

The above facts demonstrate that CASE was never prejudiced by the Staff's decision not to disclose the identities of the letter-designated individuals. CASE had access to the identities of all those individuals through Mr. Atchison himself and by Applicants' disclosures. CASE was given ample opportunity to pursue Mr. Atchison's allegations through direct testimony of Mr. Atchison and by deposition and cross-examination of persons involved in the I&E Report. Accordingly, the Appeal Board should find that CASE was not prejudiced by the Staff's decision not to disclose the identities of the individuals named in I&E Report 82-10/82-05.

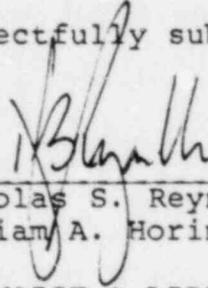
VI. CONCLUSION

For the foregoing reasons, Applicants urge the Appeal Board in its review of the instant appeal to address the question of whether any party to this proceeding was prejudiced by the Staff's decision not to disclose the names of individuals

¹⁷ As mentioned above, the Board originally directed that depositions be completed by August 23, 1982 but, upon request by CASE, extended the deadline to August 24, 1982.

identified by letter designation in I&E Report 82-10/82-05.
Applicants submit that clearly no prejudice resulted from the
Staff's action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Brief In Response To NRC Staff Exceptions To Atomic Safety And Licensing Board's Order Denying Reconsideration Of September 30, 1982," in the above-captioned matter, were served upon the following persons by deposit in the United States mail, first class postage prepaid, this 22nd day of December 1982:

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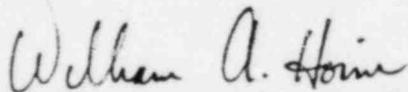
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